RECORD AND BRIEFS

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Nos. 17-71, 17-74

IN THE

Supreme Court of the United States

WEYERHAEUSER CO.,
Petitioner,

v.

U.S. FISH AND WILDLIFE SERVICE, *et al.*,
Respondents.

MARKLE INTERESTS, L.L.C., *et al.*,
Petitioners,

v.

U.S. FISH AND WILDLIFE SERVICE, *et al.*
Respondents.

On Petitions for Writs of Certiorari to the U.S. Court of Appeals for the Fifth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Endanger Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

2. Whether federal law precludes courts from reviewing an agency decision not to exclude a tract from critical habitat pursuant to 16 U.S.C. § 1533(b)(2), where the agency bases its decision on a determination that the cost of designation (measured in terms of lost development value for the tract) is not disproportionate to "biological" benefits of designation.

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INTERESTS OF *AMICI CURIAE*

Washington Legal Foundation (WLF) is a nonprofit public-interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has appeared before this Court as well as other federal courts to urge adoption of environmental policies that strike an appropriate balance between environmental safety and economic well-being. *See, e.g. Murray Energy Corp. v. EPA*, No. 15-3751 (dec. pending, 6th Cir.) (defining "Waters of the United States" under Clean Water Act); *Utility Air Reg. Group v. EPA*, 134 S. Ct. 2427 (2014) (challenge to EPA's Clean Air Act "tailoring rule"). In particular, WLF has participated in virtually every major case that has come before this Court regarding the scope of the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.* *See, e.g., Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007); *Bennett v. Spear*, 520 U.S. 154 (1997); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. More than 10 days prior to the due date, counsel for *amici* provided counsel for Respondents with notice of their intent to file. All parties have consented to the filing.

in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions, including in *Nat'l Assoc. of Home Builders.*

Amici agree with Petitioners that review is warranted on each of the Questions Presented in Nos. 17-71 and 17-74. *Amici* write separately to focus on the second question raised by Petitioner Weyerhaeuser: whether Congress intended to preclude all judicial review of decisions of the U.S. Fish and Wildlife Service (FWS) not to exclude areas from an ESA "critical habitat" designation.

As Judge Edith Jones concluded in her dissent from denial of rehearing *en banc* (joined by five other Fifth Circuit judges), the panel's holding that FWS no-exclusion decisions are not subject to judicial review "play[s] havoc with administrative law." Pet. App. 156a.[2] *Amici* are concerned that if that holding is allowed to stand, it will provide federal agencies with unilateral power to make a broad array of regulatory decisions, unchecked by any possibility of judicial review. *Amici* do not believe that the decision below is consistent with this Court's repeated and longstanding application of a "strong presumption" favoring judicial review of administrative action. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986).

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[2] When citing decisions below, *amici* reference the Petition Appendix in No. 17-71.

STATEMENT OF THE CASE

Once a plant or animal species has been listed as "endangered," the Endangered Species Act generally requires FWS (or, in appropriate cases, the National Oceanic and Atmospheric Administration) to designate "critical habitat" for the species. 16 U.S.C. § 1533(a)(3)(A). With respect to areas not "occupied" by the species at the time of its listing, such areas may not be designated as critical habitat except "upon a determination by the Secretary that such areas are *essential* for the conservation of the species." § 1532(5)(A)(ii) (emphasis added).

The ESA states that such designations "shall" be made "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." § 1533(b)(2). In determining the scope of the designated area:

> The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such areas as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such areas as critical habitat will result in the extinction of the species concerned.

Ibid.

In 2001, FWS listed the Mississippi gopher frog (a species of frog currently found only in Mississippi) as an endangered species.[3] In 2011, FWS published a proposed rule that would have designated certain areas in Mississippi (but not elsewhere) as critical habitat for the species. Pet. App. 86a. In response to peer-review comments that the designated areas were insufficient for conservation of the species, FWS amended the proposed rule to include an area in Louisiana (referred to as "Unit 1") within the designation. *Id.* at 87a.

In its 2012 final rule, FWS continued to include Unit 1 (consisting of 1,544 acres of forested land not currently occupied by the dusky gopher frog) in the area designated as critical habitat. 77 Fed. Reg. 35,118 (June 12, 2012). Petitioners (collectively, "Weyerhaeuser") own the land included in Unit 1. They filed suit in district court in 2013, challenging the "critical habitat" designation. Among their claims: FWS's designation was arbitrary, capricious, and an abuse of discretion—in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A)—because FWS failed to exclude Unit 1 from the designation, even though the costs of inclusion vastly exceeded the benefits (if any) of inclusion.

The district court granted FWS's motion for summary judgment and dismissed the complaint. Pet. App. 78a-122a. The court conceded that Petitioners' challenge to FWS's economic analysis was their "most

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[3] FWS renamed the species the "dusky gopher frog" in 2012, at about the same time that it began contemplating designating areas outside of Mississippi as "critical habitat" for the species.

compelling issue," and it labeled "most troubling" FWS's "conclusion that the economic impacts on Unit 1 are not disproportionate." *Id.* at 113a-114a. It ultimately concluded, however, that the ESA required it to defer to FWS's decision to include Unit 1 within the critical habitat designation. *Id.* at 118a.

A divided Fifth Circuit panel affirmed. Pet. App. 1a-77a. The panel majority devoted most of its opinion to explaining its conclusion that FWS acted reasonably in determining that: (1) designating occupied habitat alone would be inadequate to ensure the conservation of the dusky gopher frog; and (2) Unit 1 is essential for the conservation of the frog. *Id.* at 15a-32a. It then declined to review Weyerhaeuser's claim that Unit 1 should have been excluded from the critical-habitat designation on the basis of the designation's economic costs. *Id.* at 32a-36a. It concluded that FWS decisions not to exclude areas from such designation are "decisions 'committed to agency discretion by law'" and thus "are not reviewable in federal court." *Id.* at 33a (quoting 5 U.S.C. § 701(a)(2)). To support its conclusion that Congress intended to preclude judicial review of FWS decisions not to exclude areas on the basis of economic considerations, the panel cited the word "may" in the second sentence of 16 U.S.C. § 1533(b)(2). *Ibid.*[4]

Judge Owen dissented. Pet. App. 48a-77a. She concluded that the ESA precluded inclusion of Unit 1

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[4] The cited sentence states, in part, that FWS "*may* exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." § 1533(b)(2) (emphasis added).

in the critical-habitat designation because: (1) the area's "biological and physical characteristics will not support a dusky gopher frog population"; and (2) there is no evidence that it will become "essential" to the conservation of the species because "there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur." *Id.* at 48a. In light of her conclusion, Judge Owen did not address the majority's holding that FWS's no-exclusion determination was not subject to judicial review.

In February 2017, the Fifth Circuit voted 8-6 to deny Weyerhaeuser's petition for rehearing *en banc*. Pet. App. 124a. Judge Jones issued an opinion (joined by five other judges) dissenting from the denial. *Id.* at 124a-162a.

Among the reasons cited by Judge Jones for granting rehearing was her conclusion that "[t]he panel majority play havoc with administrative law by declaring the Service's decision not to exclude Unit 1 non-judicially reviewable." *Id.* at 156a. She faulted the panel for "never recognizing or applying" the "strong presumption favoring judicial review of administrative action," a presumption that "is not easily overcome." *Id.* at 160a. She argued that the panel decision directly conflicts with this Court's decision in *Bennett v. Spear*, that FWS *must* take economic considerations into account in making critical habitat decisions, and that "its ultimate decision regarding designation of critical habitat is reviewable for abuse of discretion." *Id.* at 161a (citing *Bennett*, 520 U.S. at 172). She concluded, "The panel majority's refusal to conduct judicial review

is insupportable and an abdication of our responsibility to oversee, according to the APA, agency action." *Id.* at 162a.

SUMMARY OF ARGUMENT

The Petitions raise issues of exceptional importance. In particular, the Fifth Circuit's determination that Congress intended to preclude all review of FWS no-exclusion decisions conflicts sharply with this Court's case law, which creates a strong presumption of judicial review of administrative action.

The Fifth Circuit held that Congress barred courts from reviewing an FWS determination to proceed with a "critical habitat" designation in the face of landowner objections that designation would impose unwarranted economic costs. Pet. App. 32a-36a. Any such congressional edict would represent an extraordinary departure from the manner in which Congress is normally presumed to legislate. That is so because "[a]bsent [judicial] review, [an agency's] compliance with the law would rest in the [agency's] hands alone." *Mach Mining, LLC v. EEOC*, 135 S Ct. 1645, 1652 (2015). The Court explained:

> We need only know—and know that Congress knows—that legal lapses and violations occur, and especially so when they have no consequence. That is why this Court has so long applied a strong presumption favoring judicial review of administrative action.

Id. at 1652-53.

The Fifth Circuit based its determination to bar judicial review of FWS cost-benefit determinations on Congress use of the word "may" rather than "shall" in the second sentence of § 1533(b)(2). That single word cannot possibly bear the weight imposed on it by FWS and the Fifth Circuit—particularly because the previous sentence in § 1533(b)(2) states that FWS, when making critical-habitat determinations, "shall" take into consideration "the economic impact ... of specifying any particular area as critical habitat." There could have been only one purpose in requiring consideration of economic impact: to prevent an area from being designated as critical habitat when the costs of doing so outweigh the benefits.

FWS may be entitled to considerable leeway in how it goes about weighing costs and benefits. But nothing in the ESA suggests that courts are precluded from reviewing FWS's ultimate determination under an abuse-of-discretion standard. Indeed, the Court in *Bennett* explicitly held that ESA critical-habitat designations were subject to judicial review based on claims that FWS failed to properly consider the "economic impact" of the designations. *Bennett*, 520 U.S. at 172. Review is warranted to resolve the conflict between *Bennett* and the Fifth Circuit's contrary holding.

In concluding that FWS no-exclusion determinations are "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), the Fifth Circuit relied on this Court's decision in *Heckler v. Cheney*, 470 U.S. 821 (1985). Pet. App. 33a. That reliance was misplaced. *Heckler* held that, in general, the decision by a federal enforcement agency not to bring an enforcement action

is not subject to judicial review, primarily because "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." 470 U.S. at 831. The Fifth Circuit sought to analogize FWS's decision not to exclude a particular area from critical habitat to an agency's decision not to bring an enforcement action. That analogy makes little sense. Any FWS decision not to exclude a particular area from critical habitat is, by definition, a decision to *include* the area in the designation—thereby subjecting the area to burdensome government regulation.

Nor can FWS realistically argue that a reviewing court would have no meaningful standard against which to judge FWS's exercise of discretion. Indeed, the Service readily concedes that point when the shoe is on the other foot. When an environmental group objects to an FWS decision to *exclude* particular areas from a critical-habitat designation on the basis of the second sentence of § 1533(b)(2), the agency decision is subject to review under an abuse-of-discretion standard. If a reviewing court has meaningful standards against which to judge an FWS decision to exclude a particular area based on a cost-benefit analysis, then it likewise has meaningful standards against which to judge an FWS no-exclusion decision.

The Fifth Circuit's decision to bar judicial review is particularly troubling because the evidence overwhelmingly supports Petitioners' contention that FWS was unable to identify *any* benefits of Unit 1 critical-habitat designation that would offset the admittedly severe economic burdens imposed on

landowners by that designation.[5] FWS's April 6, 2012 "Economic Analysis" did not identify any benefits, other than that land-use restrictions imposed as a result of the designation might preserve open space and thereby "increase adjacent or nearby property values." That "benefit" does not, of course, do anything to assist the dusky gopher frog or any other endangered species for whose benefit Congress adopted the ESA.

Given § 1533(b)(2)'s mandate that FWS consider economic impact when designating critical habitat, at some point the imbalance between costs and benefits becomes so great that the only rational decision is to exclude the area in question. As the Court recently explained, "One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). Yet, under the Fifth Circuit's ruling, courts are not permitted to review FWS's cost-benefit determination, no matter how irrational.

The circumstances surrounding adoption of § 1533(b)(2) also strongly support Weyerhaeuser's view that Congress intended to permit judicial review of FWS cost-benefit determinations. Congress added § 1533(b)(2), including its "economic impact" and

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[5] It is difficult to imagine how the designation could be of any benefit to the dusky gopher frog, given that the frog cannot be introduced into Unit 1 without the permission of landowners (permission they have said they will not grant) and given that (as FWS concedes) Unit 1 is not currently habitable for the dusky gopher frog and could not become habitable unless landowners agreed to substantial alterations of the property.

power-to-exclude language, in 1978, in response to the Court's decision in *TVA v. Hill*, 437 U.S. 153 (1978). *TVA* upheld an ESA injunction against completion of the almost-finished Tellico Dam because (some feared) it might eradicate an endangered fish, the snail darter—even though abandonment of the dam would have huge economic consequences. The principal purpose of the 1978 amendments was to ensure that the ESA would not be applied in an economically irrational manner. There is little reason to believe that a Congress intent on injecting economic rationality into ESA decision-making simultaneously barred courts from hearing claims that FWS acted irrationally in making a critical-habitat designation.

Finally, review is also warranted because the decision below represents a serious erosion of the authority of federal courts to review federal administrative action. The APA authorizes judicial review of any "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, except to the extent that "statutes preclude judicial review" or "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). By invoking the "committed to agency discretion by law" exception as the basis for precluding review of all FWS no-exclusion decisions—based on nothing more than inclusion of the word "may" in a statute—the Fifth Circuit has upended the traditional strong presumption favoring judicial review. Unless the appeals court decision is overturned, the federal government can be expected to continue to press its constricted views regarding the scope of judicial review of agency action. Indeed, FWS (and other agencies that administer the ESA) have memorialized their misinterpretation of § 1533(b)(2) in

formal regulations and guidance documents. *See, e.g.*, 50 C.F.R. § 424.19.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT BETWEEN THE DECISION BELOW AND THE COURT'S APA CASE LAW

Subject to very limited exceptions, the APA authorizes judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The Court has long recognized a "strong presumption" that the actions of federal agencies are subject to judicial review. *Bowen*, 476 U.S. at 670. As the Court recently explained:

> Congress rarely intends to prevent courts from enforcing its directives to federal agencies. For that reason, this Court applies a "strong presumption" favoring judicial review of administrative action.

Mach Mining, 135 S. Ct. at 1651 (citations omitted).

The Fifth Circuit's determination that Congress intended to preclude review of FWS's decision not to exclude Unit 1 from the critical-habitat designation (*i.e.*, its decision to include Unit 1) conflicts sharply with this Court's strong-presumption case law. Review is warranted to resolve that conflict.

A. The Decision Below Misapplies the "Committed to Agency Discretion" Exception to Judicial Review of Administrative Action

The Fifth Circuit did not contend that any federal law explicitly precludes judicial review of an agency's decision to designate ESA critical habitat. Rather, the appeals court based its no-judicial-review determination on 5 U.S.C. § 701(a)(2), which bars review when "agency action is committed to agency discretion by law." Pet. App. 33a. It concluded that Congress precluded review in this instance because there are "no meaningful standards against which to judge the agency's exercise of discretion." *Ibid* (quoting *Heckler*, 470 U.S. at 830).

The appeals court premised its invocation of § 701(a)(2) on a misunderstanding of that statute that squarely conflicts with this Court's case law. *Amici* note initially that the panel neither recognized nor applied the strong presumption favoring judicial review. Proper application of the presumption requires a court to interpret arguably ambiguous statutes as *not* providing agencies with unreviewable discretion. *Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131, 2140 (2016) ("We recognize the 'strong presumption' in favor of judicial review that we apply when we interpret statutes, including statutes that may limit or preclude review.") An agency claiming that its actions are unreviewable "bears a heavy burden in attempting to show that Congress prohibited all judicial review." *Mach Mining*, 135 S. Ct. at 1651. Yet, the decision below includes no indication that the panel imposed any evidentiary burden on FWS or even

considered interpreting statutory ambiguities in favor of permitting judicial review.

More importantly, the Fifth Circuit's reliance on *Heckler* was wholly misplaced. Properly understood, *Heckler* directly conflicts with the decision below. *Heckler* was premised on the understanding that Congress rarely provides guidelines for reviewing the propriety of an agency's decision not to initiate an enforcement action. For that reason, *Heckler* stated, "the presumption is that judicial review is *not* available" for a decision not to initiate enforcement action. 470 U.S. at 831 (emphasis added). The Court explained:

> This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. ... The reasons for this general unsuitability [for judicial review of agency decisions to refuse enforcement] are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise.

Ibid.[6]

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[6] *Heckler* held that § 701(a)(2) precluded judicial review of prison inmates' suit to compel the Food and Drug Administration to take enforcement action against several States' use of lethal-injection drugs that had not been approved by FDA as "safe and

The Fifth Circuit sought to analogize FWS's decision not to exclude a particular area from critical habitat to *Heckler*'s analysis of an agency's decision not to bring an enforcement action. Pet. App. 33a. That analogy makes little sense. Any FWS decision not to exclude a particular area from critical habitat is, by definition, a decision to *include* the area in the designation—thereby subjecting the area to burdensome government regulation. Section 1533(b)(2) sets forth a list a factors (including "economic impact") that FWS *must* take into account when designating critical habitat. Accordingly, the Fifth Circuit's conclusion that § 1533(b)(2) provides "no meaningful standard against which to judge [FWS's] exercise of discretion" in designating critical habitat, *ibid*, is implausible and conflicts sharply with *Heckler* and other decisions of this Court regarding the meaning of § 701(a)(2).

Moreover, the Fifth Circuit's position on this issue is inconsistent. The Court agreed with a Ninth Circuit decision that the FWS's invocation of § 1533(b)(2)'s second sentence to *exclude* a particular area from critical-habitat designation based on a cost-benefit analysis would be subject to judicial review. Pet. App. 35a (citing with approval *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 989 (9th Cir. 2015)). If the ESA provides sufficient "meaningful standard[s] against which to judge [FWS's] exercise of discretion" in excluding an area from a critical-habitat designation for cost-benefit reasons, then logically there also must be sufficient standards by which a court could judge

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effective" for human use. *Id.* at 837-38.

FWS's decision to *include* the same area.

That § 1533(b)(2) states that FWS "may" exclude an area from a critical-habitat designation for cost-benefit reasons does not suggest that FWS possesses absolute discretion not to exclude the area, even when inclusion would be economically irrational. Neither FWS nor the Fifth Circuit has cited any other statute that has been interpreted, based solely on inclusion of the word "may," as precluding judicial review of an agency decision not to desist from undertaking administrative action. Indeed, the Fifth Circuit's interpretation of the word "may" directly conflicts with decisions from the D.C. Circuit, which has held that a statute is not made unreviewable by the use of permissive language alone. *See, e.g., Dickson v. Secretary of Defense*, 68 F.3d 1396, 1401-02 & n.7 (D.C. Cir. 1995) (use of "may" suggests that "Congress intends to confer some discretion on the agency," not that "the matter is committed exclusively to agency discretion"; statute stating that Army "may" excuse an untimely filing does not confer unreviewable discretion not to do so).

B. The Decision Below Was Premised on a Basic Misunderstanding of the Endangered Species Act

The Fifth Circuit's no-judicial-review determination was colored by its (and FWS's) basic misunderstanding of the ESA and of § 1533(b)(2) in particular. Properly understood, the ESA requires FWS to take cost-benefit considerations into account with respect to *every* critical-habitat designation. While the statute affords FWS considerable discretion

in determining how much weight to afford cost-benefit considerations in its designation decision, nothing in the ESA suggests that courts are precluded from reviewing FWS's ultimate determination under an abuse-of-discretion standard. FWS and the Fifth Circuit interpret the statute differently; as they read it: (1) the initial decision to designate critical habitat should be based solely on the survival needs of the endangered species; (2) FWS must then analyze all the factors (including "economic impact") listed in the first sentence of § 1533(b)(2); and (3) FWS may, in its unreviewable discretion, decide to exclude areas if it concludes that the benefits of exclusion outweigh the benefits of inclusion, as set forth in the second sentence of § 1533(b)(2). *See, e.g.*, Pet. App. 15a-32a, 32a-36a; 50 C.F.R. § 424.19 (FWS regulation stating that Secretary shall "consider the probable economic and other impacts of the designation" only after initially proposing that an area be designated). That interpretation is wholly implausible. Because that erroneous interpretation is being applied to many millions of acres of land throughout the United States, review of the decision below is particularly warranted.

Congress mandated that determinations regarding the designation of land as critical habitat are to be made solely on the basis of factors set forth in § 1533(b)(2). Determinations "shall" be made:

> [O]n the basis of the best scientific evidence available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.

Nothing in § 1533(b)(2) suggests, as FWS urges and the Fifth Circuit held, that the initial designation may be based solely on the needs of the endangered species—such as a determination regarding whether designation of uninhabited lands is "essential" for the conservation of the species.

Nor does FWS satisfy its statutory obligations to designate critical habitat "after taking into consideration ... economic impact" (among other factors) by undertaking a *study* of economic impact. There is only one plausible explanation for why Congress would *require* consideration of the economic impact of designating particular areas as critical habitat: it was directing FWS to exclude areas whenever the study of economic impact led FWS to conclude that exclusion was warranted because the costs of designation exceeded its benefits.

Indeed, that is precisely what the second sentence of § 1533(b)(2) says. The second sentence imposes only one limitation on FWS's authority to exclude an area on the basis of cost-benefit considerations: it *may not* exclude the area if "failure to designate such area as a critical habitat will result in extinction of the species concerned." FWS and the Fifth Circuit improperly read the two sentences of § 1533(b)(2) as though they address wholly separate topics: (1) requiring the agency to conduct a study of economic impact; and (2) granting FWS the option, on the basis of the study and at its unreviewable discretion, to exclude areas. But properly read, the second sentence simply provides further guidance to FWS regarding how to carry out the designation obligations imposed on it by the first sentence.

Accordingly, nothing in the language of § 1533(b)(2) rebuts the "strong presumption" that Congress intended to permit judicial review of critical-habitat designations, including review of FWS determinations that cost-benefit considerations do not warrant exclusion of particular areas from that designation.

The circumstances surrounding adoption of § 1533(b)(2) also strongly support Weyerhaeuser's view that Congress intended to permit judicial review of FWS cost-benefit determinations. Congress added § 1533(b)(2), including its "economic impact" and power-to-exclude language, in 1978, in response to the Court's decision in *TVA v. Hill*. ESA Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (1978). *TVA* upheld an ESA injunction against completion of the almost-finished Tellico Dam because (some feared) it might eradicate an endangered fish, the snail darter—even though abandonment of the dam would have huge economic consequences. The principal purpose of the 1978 amendments was to ensure that the ESA was not applied in an economically irrational manner. *See* Damien Schiff, *Judicial Review Endangered: Decisions Not to Exclude Areas from Critical Habitat Should Be Reviewable under the APA*, 47 Envtl. L. Rep. 10352, 10354-55 (2017). There is little reason to believe that a Congress intent on injecting economic rationality into ESA decision-making simultaneously barred courts from hearing claims that FWS acted irrationally in making a critical-habitat designation.

C. The Decision Below Directly Conflicts with this Court's Holding in *Bennett*

In concluding that 5 U.S.C. § 701(a)(2) bars judicial review of FWS's no-exclusion decision, the Fifth Circuit made no mention of this Court's decision in *Bennett v. Spears*. Pet. App. 32a-36a. Yet, *Bennett* addressed this precise issue and concluded that FWS economic-impact decisions were judicially reviewable under the APA. Review by this Court is warranted to resolve the conflict between *Bennett* and the decision below.

At issue in *Bennett* was an FWS Biological Opinion that concluded: (1) long-term operation of the Klamath Irrigation Project was likely to jeopardize two endangered species of fish; and (2) a reasonable and prudent measure to avoid that jeopardy was to require the maintenance of minimum water levels on certain reservoirs (thereby reducing the amount of water available for irrigation). The plaintiffs sought judicial review of the Biological Opinion, asserting that: (1) it implicitly designated critical habitat for the endangered fish; and (2) that designation violated § 1533(b)(2) because it was undertaken without "tak[ing] into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." *Bennett*, 520 U.S. at 172.

The government sought dismissal of the claim by asserting that, under § 1533(b)(2), FWS possessed unreviewable discretion in deciding whether to exclude particular areas from a critical-habitat designation based on economic-impact considerations. The Court

rejected that assertion, stating, "the terms of § 1533(b)(2) are plainly those of obligation rather than discretion." *Ibid.* The Court stated that use of the word "may" in the second sentence of § 1533(b)(2) did not alter its conclusion that courts were authorized to review—under an abuse of discretion standard—FWS's ultimate decision regarding whether to exclude particular areas from a critical-habitat designation based on cost-benefit considerations. *Ibid.*

Judge Jones's dissent from denial of rehearing *en banc* highlighted the clear conflict between *Bennett* and the panel decision. Pet. App. 160a-161a. Neither the panel nor the judges voting to deny rehearing challenged her conclusion that *Bennett*'s holding authorizes judicial review under the circumstances of this case. Review is warranted to resolve the conflict.

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW PRECLUDES REVIEW OF ECONOMICALLY IRRATIONAL DECISION-MAKING

The Fifth Circuit's decision to bar judicial review is particularly troubling because the evidence overwhelmingly supports Petitioners' contention that FWS was unable to identify *any* benefits of Unit 1 critical-habitat designation that would offset the admittedly severe economic burdens imposed on landowners by that designation.[7]

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[7] As explained *supra* at 10 n.5, the designation of Unit 1 as "critical habitat" cannot possibly provide *any* benefit to the dusky gopher frog, at least for the foreseeable future..

An economic analysis commissioned by EPA concluded that the designation of Unit 1 could decrease the value of that property by as much as $34 million. The same analysis identified *no* benefits that the designation would provide to the dusky gopher frog. IEC, *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog* (Apr. 6, 2012) at 5-1 to 5-3.

In its final rule, FWS nonetheless concluded, "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. at 35,141. FWS did not explain what it meant by the word "disproportionate" or how it arrived at its no-disproportionate-costs conclusion. But one can reasonably question the rationality of that decision, given that the ratio of costs to benefits in this instance is infinite.

Given § 1533(b)(2)'s mandate that FWS consider economic impact when designating critical habitat, at some point the imbalance between costs and benefits becomes so great that the only rational decision is to exclude the area in question. As the Court recently explained, "One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). Yet, under the Fifth Circuit's ruling, courts are not permitted to review FWS's cost-benefit determination, no matter how irrational, and even if there is no benefit at all.

The Fifth Circuit sought to distinguish *Michigan*, noting that the defendant in that case (EPA) had explicitly declined to consider costs before imposing new Clean Air Act (CAA) regulations (despite a statutory requirement to consider whether the regulation was "appropriate and necessary"), while FWS *did* "tak[e] into consideration" economic impact before designating Unit 1. Pet. App. 36a. But surely, § 1533(b)(2)'s "taking into consideration" requirement mandates more than simply adding up potential costs. It also mandates an analysis of whether designation is warranted in light of those costs and the complete absence of benefits—an analysis that FWS (all evidence suggests) never undertook. More importantly, nothing in § 1533(b)(2) indicates that courts are barred from reviewing Petitioner's claim that FWS failed to take economic impact into consideration when deciding not to exclude Unit 1.

III. THE DECISION BELOW SERIOUS ERODES THE AUTHORITY OF FEDERAL COURTS TO REVIEW FEDERAL ADMINISTRATIVE ACTION

Review of the Fifth Circuit's decision is particularly warranted because it represents a frontal assault on the presumption of reviewability of agency action. Numerous federal statutes use permissive language when describing the authority of agencies to act or not act. If mere use of the word "may" in a statute is to be viewed as a signal that an agency's decision not to desist from enforcement action is not reviewable, then little will be left of the "strong presumption" of reviewability.

In particular, the immigration laws are replete

with discretionary language regarding the federal government's authority to desist from removing an alien who is present in the United States without authorization. *See, e.g.*, 8 U.S.C. § 1158(b)(1)(A) ("The Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures [they] establish[ ]") (emphasis added). If the decision below is allowed to stand, the rights of large numbers of aliens to contest their removal in federal court could reasonably be called into question.

Nor is there anything unique about FWS's contention in this case that its no-exclusion decision is unreviewable. Indeed, FWS has espoused this interpretation of § 1533(b)(2) for at least nine years. *See* Solicitor, Department of Interior, *The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the ESA* (Oct. 2008).[8] Unless review is granted, FWS will continue to urge courts to adopt the same unwarranted interpretation of § 1533(b)(2) adopted by the Fifth Circuit.

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[8]Given the "strong presumption" of reviewability of administrative action that courts employ when construing federal statutes, FWS's restrictive interpretation of § 1533(b)(2) is not entitled to deference from the courts.

CONCLUSION

The Court should grant the Petitions.

Respectfully submitted,

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